87-1176

No.

Supreme Court, U.S.
FILED
JAN 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

DON'S PORTA SIGNS, INC., WEST COAST SIGN CO., LTD., SIGNS BY DESIGN OF FLORIDA, INC., NORWOOD LEASING, INC., DON LEWIS, INC., d/b/a INTERNATIONAL JEWELRY IMPORTS and R. W. WHITTLE, INC., d/b/a PIK-A-FLIK,

Petitioners,

vs.

CITY OF CLEARWATER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETER J. WINDERS
(Counsel of Record)
DONALD E. HEMKE
CARLTON, FIELDS, WARD, EMMANUEL, SMITH, CUTLER & KENT, P.A.
P.O. Box 3239
Tampa, Florida 33601
(813) 223-7000
Attorneys for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED FOR REVIEW

Whether the court of appeals improperly exercised *de novo* review of the district court findings of fact *where the district court found in favor of the party asserting First Amendment rights.*

Whether the Eleventh Circuit panel decision conflicts with Federal Rule of Civil Procedure 52, precedent from this Court, and precedent from other courts of appeals concerning the scope of review of district court findings of fact.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before the court of appeals were Don's Porta Signs, Inc., West Coast Sign Co., Ltd., Signs by Design of Florida, Inc., Norwood Leasing, Inc., Don Lewis, Inc., d/b/a International Jewelry Imports, R. W. Whittle, Inc., d/b/a Pik-a-Flik, plaintiffs-appellees; and City of Clearwater, defendant-appellant.

TABLE OF CONTENTS

Questions Presented I
Parties to the Proceedings II
Table of Contents III
Table of Authorities IV
Opinions Below 1
Jurisdiction 2
Constitutional Provisions, Treaties, Statutes, Ordinances, and Regulations Involved 2
Statement of the Case 3
Reasons for Granting the Petition 4
Conclusion 16
Appendix 1–a
A. Stipulated motion and temporary restraining order 1–a
B. Order granting motion for preliminary injunction 6–a
C. Memorandum opinion and order granting permanent injunction 26–a
D. Court of appeals opinion 44–a
E. Court of appeals order on petition(s) for rehearing and suggestion(s) for rehearing en banc 58–a
F. City of Clearwater sign ordinance 61–a

TABLE OF AUTHORITIES

Cases

Anderson v. City of Bessemer City, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed. 2d 518 (1985) 12, 13, 15

Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed. 2d 502 (1984) ..... *passim*

Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed. 2d 341 (1980) 3

City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 106 S.Ct. 2034, 90 L.Ed. 2d 480 (1986) 11

City of Rome v. United States, 446 U.S. 156, 184-187, 100 S.Ct. 1548, 1565-1567, 64 L.Ed. 2d 119 (1980) 12

County of Los Angeles v. Kling, 474 U.S. 936, 106 S.Ct. 300, 88 L.Ed. 2d 277 (1985) 14, 15

Dunagin v. City of Oxford, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (en banc), *cert. denied*, 467 U.S. 1259, 104 S.Ct. 3553, 82 L.Ed. 2d 855 (1984) 5

Edwards v. South Carolina, 372 U.S. 229, 235, 83 S.Ct. 680, 683, 9 L.Ed. 2d 697 (1963) 8

Fiske v. Kansas, 274 U.S. 380, 385-387, 47 S.Ct. 655, 656-657, 71 L.Ed. 1108 (1927) 8

Greenbelt Cooperative Publishing Assn. v. Bresler, 398 U.S. 6, 11, 90 S.Ct. 1537, 1540, 26 L.Ed. 2d 6 (1970) 8

Hess v. Indiana, 414 U.S. 105, 108-109, 94 S.Ct. 326, 328-329, 38 L.Ed. 2d 303 (1973) 7

Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 106 S.Ct. 1527, 89 L.Ed. 2d 739 (1986) 12, 13, 15

Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 102 S.Ct. 2182, 72 L.Ed. 2d 606 (1982) 12, 14, 15

Jacobellis v. Ohio, 378 U.S. 184, 190, 84 S.Ct. 1676, 1679, 12 L.Ed. 2d 793 (1964) 8, 9

Jenkins v. Georgia, 418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed. 2d 642 (1974) 7

Lindsay v. City of San Antonio, 821 F.2d 1103, 1110 (5th Cir. 1987), *application for certiorari pending*, ... U.S. ..... (1987) 5

Maine v. Taylor, 477 U.S. 131, 106 S.Ct. 2440, 2451, 91 L.Ed. 2d 110 (1986) 15

Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 803 n.22, 104 S.Ct. 2118, 2127 n.22, 80 L.Ed. 2d 772 (1984) 11

Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed. 2d 419 (1973) 7-8

Monitor Patriot Co. v. Roy, 401 U.S. 265, 277, 91 S.Ct. 621, 628, 28 L.Ed. 2d 35 (1971) 8

NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933, 934, 102 S.Ct. 3409, 3436-3437, 73 L.Ed.2d 1215 (1982) 7

New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed. 2d 1113 (1982) 7

New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964) ..... *passim*

Pennekamp v. Florida, 328 U.S. 331, 335, 66 S.Ct. 1029, 1031, 90 L.Ed. 1295 (1946) 8

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S.Ct. 1558, 1564, 89 L.Ed. 2d 783 (1986) 11

Planned Parenthood Association/Chicago Area v. Chicago Transit Authority, 767 F.2d 1225 (7th Cir. 1985) 10, 11

Pullman-Standard v. Swint, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed. 2d 66 (1982) 12, 14, 15

Rankin v. McPherson, 107 S.Ct. 2891, 97 L.Ed. 2d 315 (1987) 9

Rogers v. Lodge, 458 U.S. 613, 622-623, 102 S.Ct. 3272, 3278, 73 L.Ed. 2d 1012 (1982) 12
Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 54, 91 S.Ct. 1811, 1825, 29 L.Ed. 2d 296 (1971) 8
St. Amant v. Thompson, 390 U.S. 727, 732-733, 88 S.Ct. 1323, 1326-1327, 20 L.Ed. 2d 262 (1968) 8
Street v. New York, 394 U.S. 576, 582, 89 S.Ct. 1354, 1365, 22 L.Ed. 2d 572 (1969) 8
Tavoulareas v. Piro, 759 F.2d 90, 107-109, *vacated in part by* 763 F.2d 1472 (D.C. Cir. 1985) 12
Thornburg v. Gingles, 106 S.Ct. 2752, 2781 (1986) 9, 10, 12, 15
Time, Inc. v. Pape, 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed. 2d 45 (1971) 9
United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 2d 746 (1948) 12
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed. 2d 129 (1969) 12

Constitutional Provisions

First Amendment, U.S. Constitution ..... *passim*
Fourteenth Amendment, U.S. Constitution 2

Statutes

28 U.S.C. § 1254 2
28 U.S.C. § 1331 3
28 U.S.C. § 1332 3
28 U.S.C. § 1343(3)(4) 3

Rules

Federal Rule of Civil Procedure 52 ..... *passim*
Supreme Court Rule 17 4

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

DON'S PORTA SIGNS, INC., WEST COAST SIGN CO., LTD., SIGNS BY DESIGN OF FLORIDA, INC., NORWOOD LEASING, INC., DON LEWIS, INC., d/b/a INTERNATIONAL JEWELRY IMPORTS and R. W. WHITTLE, INC., d/b/a PIK-A-FLIK,

Petitioners,

vs.

CITY OF CLEARWATER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Don's Porta Signs, Inc., et al., petitioners herein, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this case on October 13, 1987.

OPINIONS BELOW

The opinion of the court of appeals (Appendix, infra, 44-a) is reported at 829 F.2d 1051. The orders and memoranda opinions of the district court are reprinted in the Appendix hereto, pages 1-a, 6-a, 26-a.

JURISDICTION

On October 13, 1987, a panel of the court of appeals decided *Don's Porta Signs, Inc. v. City of Clearwater,* Case No. 86-3159 (Appendix 44-a). On November 25, 1987, the Eleventh Circuit denied petitioners' timely petition for rehearing and rehearing en banc (Appendix 58-a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

This case involves the First and Fourteenth Amendments to the United States Constitution and the City of Clearwater's sign ordinance. The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The City's sign ordinance is reprinted in the appendix (page 61-a).

STATEMENT OF THE CASE

On August 29, 1985, the City adopted sign regulations which effectively prohibit portable signs within the City. Portable signs are used for commercial and non-commercial messages.

On October 16, 1985, petitioners (users and suppliers of portable signs) filed a complaint for damages, declaratory judgment and injunctive relief. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332, and 1343(3)(4). On October 22, 1985, the district court entered a temporary restraining order (Appendix 1-a); on November 14, 1985, a preliminary injunction (Appendix 6-a); and on February 27, 1986, a permanent injunction (Appendix 26-a). The district court, applying the four-prong test of *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557 (1980), found in a nine-page memorandum decision that the City had failed to prove that the prohibition of portable signs directly advanced substantial governmental interests and that the prohibition reached no further than necessary. The district court found that the prohibition "singles out the small businessman, non-profit organization, and political candidate."

The City appealed to the United States Court of Appeals for the Eleventh Circuit. On October 13, 1987, a panel of the Eleventh Circuit, upon a *de novo* review of the district court's factual findings, reversed the district court's judgment because it found that the record sufficiently supported the City's judgment to eliminate portable signs (Appendix 44-a). The panel reversed even though it found that the district court applied the proper legal test. On November 25, 1987, the Eleventh Circuit denied petitioners' motion for rehearing and rehearing en banc (Appendix 58-a).

REASONS FOR GRANTING THE PETITION

This case presents questions of substantial and reoccurring importance concerning the protection of First Amendment rights and concerning the scope of review of district court findings of fact. This case involves conflict with Federal Rule of Civil Procedure 52, precedent from this Court, and precedent from other circuits (Supreme Court Rule 17.1(a)(c)). Its importance goes beyond portable signs to all cases involving the First Amendment. The opinion of the panel of the Eleventh Circuit converts courts of appeals from protectors of First Amendment rights to courts designed to ensure that persons are not afforded their First Amendment rights too broadly.

The parties' briefs in the Eleventh Circuit indicated that the dispute was entirely factual (see City Brief 1-12, 15-16, 17-33, City Reply Brief 1-20, Plaintiffs' Brief 1-15, 22-39). There was no dispute over controlling law (see City Brief 16-17, Plaintiffs' Brief 16).

On appeal to the Eleventh Circuit, petitioners pointed out that the appropriate standard of review was whether the district court's findings were clearly erroneous (Plaintiffs' Brief 18-20). The City even admitted that the issue on appeal was "[w]hether the trial court's decision that the City of Clearwater had failed to demonstrate that the City's prohibition of portable signs serves a substantial public interest and that there are no equally effective less intrusive regulations is *clearly erroneous*" and admitted that "[t]he appropriate standard of review concerning fact findings by the lower court is whether the findings of fact are clearly erroneous under Fed.R.Civ.P. 52(a)" (City Brief 1, 2, 12, 18, 26, City Reply Brief 23).

Nonetheless, the panel of the Eleventh Circuit applied a *de novo* review of the district court's findings. The

panel found, for example, that "the record sufficiently supports the *City's judgment* that the regulation of portable signs will help to eliminate visual clutter. . . ." The panel never determined that the district court's findings were clearly erroneous. Rather, in reversing the district court opinion, the panel indicated that it was "not bound by the 'clearly erroneous' standard of review in determining whether a commercial speech regulation directly advances the government's goals or is more expansive than necessary" and "ma[de] an independent examination of the whole record" (footnote 9). In determining that *de novo* review was appropriate, the panel purported to rely on *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed. 2d 502 (1984); on *Lindsay v. City of San Antonio*, 821 F.2d 1103, 1110 (5th Cir. 1987), *application for certiorari pending*, ... U.S. ..... (1987), which relied on *Bose Corporation;* and on *Dunagin v. City of Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (en banc), *cert. denied*, 467 U.S. 1259, 104 S.Ct. 3553, 82 L.Ed. 2d 855 (1984).[1]

In undertaking *de novo* review, the panel erred and disregarded Federal Rule of Civil Procedure 52 and controlling precedent from this Court.

This Court in *Bose Corporation* indicated that "an appellate court has an obligation to 'make an independent examination of the whole record' *so as to assure that 'the judgment does not constitute a forbidden intrusion on the field of free expression'*" (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-286, 84 S.Ct. 710, 728-729, 11 L.Ed. 2d 686, 933-934 (1964)).

In *Bose Corporation* and *New York Times*, the underlying judgments were *against* the party asserting First

---

1. The portable sign companies in *Lindsay* have filed a petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Amendment rights. In *Bose Corporation,* for example, the district court entered a judgment for the plaintiff on a product disparagement claim over defendant's defense that its statements were protected by the First Amendment. The court of appeals in *Bose Corporation* performed a "de novo review, independently examining the record to ensure that the district court has applied properly the governing constitutional law and that plaintiff has indeed satisfied its burden of proof." 104 S.Ct. at 1955. This Court affirmed in *Bose Corporation,* framing the issue as whether Rule 52(a) "prescribe[s] the standard to be applied by the Court of Appeals in its review of a *District Court's determination that a false statement was made with 'actual malice'* described in *New York Times,*" and holding that the court of appeals properly applied an independent examination to protect First Amendment rights.

Here, to the contrary, the underlying judgment was *in favor of the party asserting First Amendment rights.* The rationale in *Bose Corporation* and *New York Times* for a *de novo* review when First Amendment claims are rejected is that the courts of appeals are first and foremost protectors of Constitutional rights, a role which justifies a departure from their more common role as a court of error and review. There is no such justification where the district court's judgment is *in favor* of the First Amendment assertion. In addition to disregarding the rationale of *Bose Corporation* and *New York Times,* the decision below converts the appellate court from a protector of First Amendment rights to a fact-finder designed to ensure against district courts recognizing First Amendment rights too broadly.

Bose Corporation is clear that the "independent examination" duty was designed to ensure that district courts

fully accord speakers their First Amendment rights, rather than designed to ensure that district courts do not accord speakers their First Amendment rights too broadly. As Justice Stevens noted in *Bose Corporation,*

> The Court has regularly conducted on *independent review* of the record both to be sure that the speech in question actually falls within the *unprotected* category and to confine the perimeters of any protected category within acceptably narrow limits *in an effort to ensure that protected expression will not be inhibited* . . . The principle of viewpoint neutrality . . . imposes a *special responsibility on judges whenever it is claimed that a particular communication is unprotected* . . . The requirement of independent appellate review . . . is a rule of federal constitutional law . . . It reflects a deeply held conviction that judges . . . must exercise such review *in order to preserve the precious liberties established and ordained by the Constitution* . . . Judges, as expositors of the Constitution, must independently decide *whether the evidence is sufficient to cross the constitutional threshold that bars entry of any judgment that is not supported by clear and convincing proof of "actual malice."*

That the "independent examination" in *Bose Corporation* applies only where the underlying judgment is against the party asserting First Amendment rights is also clear from the cases cited in *Bose Corporation.*[2] *The underlying*

---

2. *New York Times/Sullivan; NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 933, 934, 102 S.Ct. 3409, 3436-3437, 73 L.Ed. 2d 1215 (1982); *New York v. Ferber,* 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed. 2d 1113 (1982); *Jenkins v. Georgia,* 418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed. 2d 642 (1974); *Hess v. Indiana,* 414 U.S. 105, 108-109, 94 S.Ct. 326, 328-329, 38 L.Ed. 2d 303 (1973); *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed. 2d 419

(Continued on following page)

trial court judgments in all fourteen of the cases cited in the footnote and Bose Corporation were against the party asserting First Amendment rights. Some of those cases clearly express the rationale for *de novo* review in First Amendment cases. Indeed, Justice Stevens noted that *Fiske v. Kansas,* 274 U.S. 380, 385-387, 47 S.Ct. 655, 656-657, 71 L.Ed. 1108 (1927), had indicated that this Court "will review findings of fact by a State court *where a federal right has been denied* on the basis of a fact without evidence to support it. . . ." 104 S.Ct. at 1962 n.24.

> In *New York Times,* this Court noted that
> [W]e must make *an independent examination of the whole record so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.* 84 S.Ct. at 729.

That rationale is clearly inapplicable where, as here, the underlying district court judgment is in favor of the party asserting First Amendment rights.

In *Greenbelt Cooperative,* this Court undertook an "independent examination of the whole record" where the underlying judgment was against the party claiming First Amendment rights because the judgment "may impair the unfettered exercise of these First Amendment freedoms." 90 S.Ct. at 1541. Again, the underlying district court

---

Footnote continued—

(1973); *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 277, 91 S.Ct. 621, 628, 28 L.Ed. 2d 35 (1971); *Greenbelt Cooperative Publishing Assn. v. Bresler,* 398 U.S. 6, 11, 90 S.Ct. 1537, 1540, 26 L.Ed. 2d 6 (1970); *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 54, 91 S.Ct. 1811, 1825, 29 L.Ed. 2d 296 (1971); *Street v. New York,* 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed. 2d 572 (1969); *St. Amant v. Thompson,* 390 U.S. 727, 732-733, 88 S.Ct. 1323, 1326-1327, 20 L.Ed. 2d 262 (1968); *Jacobellis v. Ohio,* 378 U.S. 184, 190, 84 S.Ct. 1676, 1679, 12 L.Ed. 2d 793 (1964); *Edwards v. South Carolina,* 372 U.S. 229, 235, 83 S.Ct. 680, 683, 9 L.Ed. 2d 697 (1963); and *Pennekamp v. Florida,* 328 U.S. 331, 335, 66 S.Ct. 1029, 1031, 90 L.Ed. 1295 (1946).

judgment here advances - rather than impairs - First Amendment rights.

Where the district court rules *against* the free speech claim, an independent review in the appellate courts is necessary to ensure that there is full protection of First Amendment rights. In *Jacobellis,* for example, this Court noted "its obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments." 84 S.Ct. at 1679. *Bose Corporation* also cited with approval *Time, Inc. v. Pape,* 401 U.S. 279, 284, 91 S.Ct. 633, 636, 28 L.Ed. 2d 45 (1971), where this Court endorsed "independent examination" where "there is a claim *of denial of rights* under the Federal Constitution." In *Pape,* this Court noted that it would review "the . . . record to determine whether it could constitutionally support a judgment" against the party asserting First Amendment rights. More recently, this Court examined the record as a whole in *Rankin v. McPherson,* 107 S.Ct. 2891, 2897 n.9, 97 L.Ed. 2d 315 (1987), where the district court judgment again was *against the party asserting the First Amendment rights.*

In no case, however, has this Court sanctioned or undertaken an independent review of the facts in the record to ensure that the trial court did not afford parties their First Amendment rights too broadly. Indeed, this Court has refused to apply *Bose Corporation* to permit *de novo* review of a decision *in favor* of an asserted Constitutional right. In *Thornburg v. Gingles,* 106 S.Ct. 2752, 2781 (1986), an appeal from a three-judge district court, the appellants relied primarily on *Bose Corporation* in arguing that the district court's ultimate conclusion of vote dilution was a mixed question of law and fact subject to *de novo* review on appeal. This Court dis-

agreed, finding that "vote dilution [was] a question of fact subject to the clearly erroneous standard of Rule 52(a)." 106 S.Ct. at 2781.

At least one court of appeals has expressly recognized that the rationale of *Bose Corporation* does not apply where the underlying judgment, like the district court judgment here, is in favor of the party asserting First Amendment rights. In *Planned Parenthood Association/Chicago Area v. Chicago Transit Authority*, 767 F.2d 1225 (7th Cir. 1985), the district court ruled *in favor* of the party asserting First Amendment rights, as did the district court below. On appeal, the Chicago Transit Authority, the government agency seeking to restrain the asserted First Amendment rights, cited *Bose Corporation* for the proposition that the appellate court should undertake a *de novo* review of the record and that the "clearly erroneous" standard should not apply. After carefully reviewing Supreme Court precedent, the Seventh Circuit disagreed, and applied the clearly erroneous standard, noting:

> Independent appellate review of such facts assures that the suppression of protected speech—particularly unpopular or controversial speech—is not insulated from close scrutiny by the straightforward application of the clearly-erroneous rule. *The rule thus reflects a special solicitude for claims that the protections afforded by the First Amendment have been unduly abridged.*
>
> CTA is not before this court claiming abridgement of its First Amendment rights. Its claim is, rather, that its proprietary interest in excluding PPA's message from its trains and buses has been wrongly restricted. *The doctrine of independent review has never*

> *been thought to afford special protection for the government's claim that it has been wrongly prevented from restricting speech.* Accordingly, we do not agree with CTA that the district court's factual findings should be subjected to a more exacting standard of review than the standard of Rule 52(a).

767 F.2d at 1229. Here, on the other hand, the panel would extend an exception from Fed.R.Civ.P. 52(a)—an exception this Court specially carved to protect First Amendment rights—to overturn a judgment in favor of First Amendment rights. The Eleventh Circuit's decision in both rationale and in effect is in direct opposition to and conflict with the Seventh Circuit's decision and to the decisions of this Court discussed above.

Particularly was the court of appeals' fact-finding here improper where the City had the burden of justifying the restriction. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558, 1564, 89 L.Ed. 2d 783 (1986). "Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force. This Court may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity." *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 106 S.Ct. 2034, 90 L.Ed. 2d 480 (1986), *quoting Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803 n.22, 104 S.Ct. 2118, 2127 n.22, 80 L.Ed. 2d 772 (1984).

Even where the underlying judgment is against the party asserting First Amendment rights, independent review extends only to ultimate conclusions (rather than to

separate fact determinations). *Tavoulareas v. Piro,* 759 F.2d 90, 107-109, *vacated in part by* 763 F.2d 1472 (D.C. Cir. 1985), discussing *Bose Corporation.* Here, the panel's independent review extended to factual determinations - such as whether the prohibition would improve aesthetics within the City - rather than to the ultimate conclusions - such as whether protected speech is involved.

Because the specially carved exception of *Bose Corporation* is clearly inapplicable here, the panel decision conflicts with Fed.R.Civ.P. 52(a), *Thornburg v. Gingles,* 106 S.Ct. 2752, 2781 (1986); *Icicle Seafoods, Inc. v. Worthington,* 475 U.S. 709, 106 S.Ct. 1527, 89 L.Ed. 2d 739 (1986); *Anderson v. City of Bessemer City,* 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed. 2d 518 (1985); *Rogers v. Lodge,* 458 U.S. 613, 622-623, 102 S.Ct. 3272, 3278, 73 L.Ed. 2d 1012 (1982); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.,* 456 U.S. 844, 102 S.Ct. 2182, 72 L.Ed. 2d 606 (1982); *Pullman-Standard v. Swint,* 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed. 2d 66 (1982); *City of Rome v. United States,* 446 U.S. 156, 184-187, 100 S.Ct. 1548, 1565-1567, 64 L.Ed. 2d 119 (1980); *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed. 2d 129 (1969); and *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 2d 746 (1948).

Rule 52(a) requires an appellate court to affirm a district court's findings of fact unless clearly erroneous. Rather than review the district court's findings to determine if they were clearly erroneous, the panel, with its *de novo* fact-finding, concluded that the record sufficiently supported the City's judgment that banning portable signs would directly advance the City's interest in aesthetics.

In *Thornburg,* this Court rejected appellants' claim that *Bose Corporation* authorized *de novo* review. This

Court held that the clearly erroneous standard of Rule 52(a) applied to a finding of vote dilution.

In *Worthington,* the district court held that respondents were excluded from overtime benefits as "seamen." The court of appeals, reviewing the issue *de novo,* reversed the district court, and held that respondents were not seamen. This Court granted certiorari to consider whether the district court applied the appropriate standard of review. This Court held that the court of appeals erred and that the clearly erroneous standard of Rule 52(a) should have been applied as "in other civil bench-tried litigation in federal courts." 106 S.Ct. at 1529. Thus, Chief Justice Rehnquist wrote that the court of appeals erred, as did the Eleventh Circuit here, in "simply [making] factual findings on its own." 106 S.Ct. at 1530.

In *Anderson,* this Court held that court of appeals erred in reversing district court findings of fact in light of Fed.R.Civ.P. 52(a). This Court noted that,

> The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo." If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. 105 S.Ct. at 1511.

Yet rather than comply with *Anderson,* the panel here undertook a *de novo* review of the record to do its own independent fact-finding.

In *Pullman-Standard*, this Court also held that an appeals court improperly substituted its judgment of ultimate fact for the district court. This Court noted,

> Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts.

102 S.Ct. at 1789.

In *Inwood Laboratories*, this Court held that the court of appeals improperly rejected the district court findings where, as here, the court of appeals did not find those findings to be clearly erroneous. Justice O'Connor wrote, "[a]n appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court might give the facts another construction [and] resolve the ambiguities differently. . . ." 102 S.Ct. at 2190.

The rule against *de novo* review is so well established that this Court has summarily reversed courts of appeal going beyond the clearly erroneous review. In *County of Los Angeles v. Kling*, 474 U.S. 936, 106 S.Ct. 300, 88 L.Ed. 2d 277 (1985), this Court, in two sentences citing *Anderson*, granted certiorari and summarily reversed the court of appeals' judgment where the court of appeals failed to properly defer to the district court findings in accordance with Rule 52(a).

Not only does the panel's decision conflict with *Thornburg, Worthington, Anderson, Pullman-Standard, Inwood Laboratories,* and *Kling,* the decision creates inefficiencies in the court system and would be unfair to the parties. As Justice White explained in *Anderson,*

> The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road.'"

105 S.Ct. at 1512.[3]

The Eleventh Circuit's express adoption of a procedure of *de novo* review and independent fact-finding, where not necessary to *protect* First Amendment rights, is directly contrary to the rules and precedent of this Court and to their underlying reasoning. Not only is the petitioner entitled to the First Amendment rights he established before the trier of fact unless the trier of fact's decision is clearly erroneous, but a failure to follow such established procedure is wasteful of judicial resources.

---

3. Similarly, in *Maine v. Taylor*, 477 U.S. 131, 106 S.Ct. 2440, 2451, 91 L.Ed. 2d 110 (1986), Justice Blackmun noted "the considerations underlying Rule 52(a)" included "the demands of judicial efficiency [and] the expertise developed by trial judges. . . ."

CONCLUSION

Wherefore, petitioners would request this Court to grant the petition for writ of certiorari because the Eleventh Circuit decision conflicts with Federal Rule of Civil Procedure 52, precedent from this Court, precedent from other circuits and the federal courts' traditional role in protecting First Amendment rights.

CARLTON, FIELDS, WARD, EMMANUEL,
SMITH, CUTLER & KENT, P.A.
PETER J. WINDERS
(Counsel of Record)
DONALD E. HEMKE
P.O. Box 3239
Tampa, Florida 33601
(813) 223-7000
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th of January, 1988, true and correct copies of the above and foregoing petition were served upon the City of Clearwater by United States mail to respondent's attorneys of record, Charles L. Siemon and William Merrill, Suite 903, 1800 Second Street, Sarasota, Florida 33577-5901, and M. A. Galbraith, Post Office Box 4748, Clearwater, Florida 34618-4748.

PETER J. WINDERS